**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE 292 OF 2010**

**CYRUS WAITHAKA KARIUKI ……..…… PLAINTIFF**

**VERSUS**

**CATHERINE WAMAITHA KIOI**

**(Sued in her own capacity and in her capacity as the Chairperson of**

**CITY WOMEN DEVELOPMENT GROUP) ……..……. DEFENDANT**

**R U L I N G**

1. The Application before court is the Defendant\'s Notice of Motion dated 2nd April 2012 brought under the provisions of **Order 2 Rule 15** of the Civil Procedure Rules and **sections 1 A and 1 B** of the *Civil Procedure Act*. It is an application for striking out the Amended Plaint filed herein on October 12, 2010.

**"a) The subject matter of this suit has been compromised in NAIROBI MISC. CRIMINAL APPLICATION NO. 24 OF 2010 and for the reason the reliefs sought in this suit are not available to the Plaintiff.**

**b) In compromising the said subject matter, the Plaintiff was paid and he indeed accepted Kshs.1,200,000 plus costs of Kshs.170,000.**

**c) This suit was filed despite the fact that the subject matter had been compromised, money paid to the Plaintiff who accepted it without any condition.**

**d) This suit is therefore brought with an ulterior motive aimed at extorting more money from the Defendant. This suit is for that reason frivolous, scandalous, vexatious and otherwise an abuse of the process of this Honourable Court.**

**e) The reliefs sought in the amended plaint are unknown and therefore not permitted by the laws of Kenya.**

**f) The suit is based on the tort of fraud and contract which causes of action are time barred as they have been brought after a period of more than fifteen (15) years from 1995.**

**g) The Plaintiff therefore instituted a suit for a cause of action which did not exist since the suit had been settled and the settlement thereof accepted by this Honourable Court.**

**h) It is in the interest of justice that the Amended Plaint herein be struck out and the case against the Defendant be dismissed with cost".**

**The Application is supported by the Affidavit of Catherine Wamaitha Kioi sworn on the 2 April, 2012".**

2. The Plaintiff herein swore a replying Affidavit fourth of June 2012. She deponed to the fact that at the time of this suit was filed on 7 May 2010, *Miscellaneous Criminal Application No. 24 of 2010* and *Criminal Case No. 1072 of 2010* had not been concluded as had been alleged by the Defendant in her Affidavit in support of the Application. The same were determined on 18 May 2010 and 8 October, 2010 respectively and the Plaintiff maintained that she had not been paid as at the date of filing of this suit. The final cheque in payment of the principal sum of Shs. 1,200,000/-have been given to her advocate in court on 10 May 2010. The Plaintiff noted that she had sought leave to amend her Plaint on 5 October, 2010, which leave was granted and the subsequent Amended Plaint filed, to which the Defendant never objected. She denied that she was attempting to unjustly enrich herself as the Sale Agreement referred to in the Plaint that Special Condition (1) provided for an interest rate of 30% and consequently the amount of Shs. 1,200,000/-as paid by the Defendant could not constitute full payment of interest, damages and costs. The Plaintiff went on to say that the suit was not time-barred and that the action of the Defendant in repaying the money after she had been charged with fraud in the said Criminal Case, amounted to an admission of guilt. The Plaintiff noted that these issues as to interest, damages and costs could not be effectively dealt with in a criminal case and the Defendant had never paid interest on damages for fraud, loss of use, loss of the bargain and the costs of the civil suit. The Plaintiff further maintained that the deceased never signed the said Sale Agreement as it had numerous anomalies and alterations therein that required amendment which the Defendant never effected. She also maintained that the suit was not time-barred in that there were numerous acknowledgements of debt made by the Defendant in writing. She concluded by detailing eight reasons why this suit should not proceed to full trial as she strongly believed that:

**"the City Women Development Group was couched up by the Defendant for the sole purpose of defrauding the Plaintiff."**

3. Mr. Kamotho for the Defendant submitted that the basis of the dispute was that the Plaintiff, who is now deceased, had a criminal case brought against his client. The Defendant had been charged with obtaining money by false pretences, was arrested and had pleaded not guilty before the Magistrates\' Court at Kibera. Counsel continued to recite the history of the suit before the Magistrates\' Court as well as the Defendant filing *Nairobi Miscellaneous Civil Application No. 20 of 2012* seeking an Order that the criminal proceedings at Kibera be terminated. A copy of those proceedings had been attached to the Defendant\'s Affidavit in support of the Application. Counsel noted that on 20 May 2010, before Khaminwa J the Plaintiff and his advocate confirmed that he had been paid Shs. 1.2 million as well as Shs. 170,000/-to cover his costs. The Plaintiff had confirmed before the Judge that he would withdraw the criminal proceedings at Kibera. Counsel further observed that when he and his client had appeared at Kibera for the mention of the criminal case, the Plaintiff had refused to withdraw the same and insisted that it was to proceed to hearing. He noted that the presiding Magistrate had fixed a date for the hearing being 6 July, 2010 but on that date the Plaintiff had failed to appear and he did not appear either on the adjourned next date of 29 July, 2010. The Magistrate thereupon dismissed the Criminal proceedings as against the Defendant.

4. While the proceedings at Kibera were ongoing, the Plaintiff had filed suit herein on 7 May 2010 and the Defendant was taken aback for what was being claimed in the Plaint had actually been paid by the City Women Development Group. The Defendant was unable to understand why the sum of Shs. 1.2 million was now being claimed against her, together with interest and costs. Counsel stated that by the current Application before court the Defendant was requesting the court to hand out justice and have the Amended Plaint struck out as the subject matter therein was the same subject matter as had been before Lady Justice Khaminwa in *Misc. Criminal Case No. 24 of 2010*. Counsel concluded that in fact that no fraud had been proved as against the Defendant, no contract existed between the parties to this suit and no interest is payable. As regards the law, Mr. Kamotho only cited one authority before court being the well-

known case of **Pop-in Kenya Ltd. and 3 ors. v Habib Bank Zürich (1990) 1 KLR 609**. However counsel stated that he had also come upon another decision being that of the English House of Lords being **Hunter v Chief Constable of West Midlands & anor. (1981) 3 All ER 727**.

5. In his turn, Mr. Wachira submitted that there had been a contract between the parties and referred the court to the Affidavit filed by the Plaintiff dated 9 November 2007 in *HC. Misc Application 24 of 2010*. At page 70 of the Exhibit to that Affidavit, the Plaintiff had attached such agreement which was undated but at Special Condition No. 1 on page 2 of the agreement, the specific rate of interest to the agreement sum was quoted as 30% per annum. The Applicant had paid Shs. 1.2 million and thereafter brought the agreement in the name of a third party. The court had been referred to *Criminal Case No. 1072 of 2009 at Kibera* – the genesis of that charge was because the Plaintiff herein had conducted a search on the subject parcel of land, only to find that it had been subdivided and sold to other people to the exclusion of the Plaintiff. He noted that the Applicant was still selling land that had already been sold. It was correct that the Plaintiff was paid Shs. 1.2 million. It was also clear that the proceedings in Kibera were concluded only 8 October, 2010. The suit before this court had been filed on 7 May 2010, five months before, so the issue of *res judicata* does not arise. Counsel maintained that the authority produced before court was therefore irrelevant. Further, it was clear that the proceedings before Khaminwa J. were terminated, after this suit had been filed, on 18 May 2010. He noted that the Plaint was amended on the 10 October, 2010 and such application for amendment was never opposed by the Applicant. In contrast, the Plaintiff would never have made the Application to amend its Plaint if she did not believe that that there was a proper suit. The Defendant should have opposed the Application to amend but she did not and proceeded to file an amended Statement of Defence. Now, two years down the line, the Defendant has come running to court.

6. Mr. Wachira went on to say that he believed that the Application was an abuse of the court process in that the first of the three grounds put forward in support of the Application detailed that the suit had been compromised. These were the same grounds that had been canvassed before my learned brother Ogola J. on 9 November, 2011 who had directed that the same should go for full hearing. The Defendant will suffer no prejudice if the suit so proceeds. Further counsel noted that no questions of interest or damages were raised in the case before Khaminwa J. Paragraph 6 of the Affidavit in support of the Application detailed that the Applicant had stated that the Shs. 200,000/-constituted full payment for the costs of the Plaintiff in the Criminal case. Counsel noted that the Plaintiff in this suit is requesting that interest be paid on the monies that had been received by the Applicant over the many years as well as for general damages for fraud. He noted that such could not be awarded by a criminal court in Kibera. Further, *Miscellaneous Criminal Application No. 24 of 2010* was an application brought against the State not against the Plaintiff herein. It would not have been possible for the Plaintiff to have raised issues of interest and general damages in a miscellaneous criminal application. Counsel emphasised that the Plaintiff was here to enforce a contract which could not have been confirmed in a criminal court. He noted that the suit had been brought within time under the provisions of the Limitation of Actions Act and referred the court to *Civil Appeal No. 25 of 2007* **Afrofreight Forwarders Limited v African Liner Agencies (2009) e KLR**. In that suit, counsel stated, the Court of Appeal had detailed that with every acknowledgement of debt, time starts afresh. Finally, counsel wrapped up his submissions by stating that the City Women\'s Development Group was brought into existence so that the Plaintiff could hide behind it. Counsel referred to a number of letters exhibited to the Plaintiff\'s Replying Affidavit and observed that no single letter had been on the Group\'s letterhead paper. The Group\'s name appeared nowhere except on the Agreement.

7. Mr. Kamotho stated that the Agreement to which the court had been referred to by counsel for the Plaintiff is not dated, is not signed and as such it does not exist. As the Agreement cannot be relied upon, the question of interest being payable thereunder does not arise. As to the timing of the filing of this Plaint, Mr. Kamotho referred to page 19 of the Affidavit in support of the Application. He referred the court to the proceedings before it of the 26 April, 2010. Such detailed Mr. Wachira, counsel for the Plaintiff, saying that he was accepting the Defendant\'s cheque and this was before this suit was filed. As regards *Miscellaneous Criminal Application No. 24 of 2010*, the Plaintiff herein appeared as an interested party which was why Mr. Wachira participated in the proceedings. Further, the City Women\'s Development Group was also an interested party thereat with advocate representation. Finally Mr.

Kamotho detailed that the parties have a duty to assist this court in arriving at a swift settlement of the dispute before it.

8. As I see it, the crux of this matter is whether the Applicant is correct in stating that the reason why the Plaintiff filed this suit was because of an ulterior motive aimed at getting more money from the Defendant. It is common ground that the Defendant paid the sum of Shs. 1,200,000/-plus advocates costs in the sum of Shs. 170,000/-in respect of *Kibera Criminal Case No.1072 of 2009*. I have perused the record of this court in *Miscellaneous Criminal Application No. 24 of 2010*. On 26 April, 2010 before my learned sister Khaminwa J. Mr. Baabu appeared before the Defendant herein, Mrs. Obuo appeared for the State, Mr. Wachira appeared for the Plaintiff as the second Respondent therein and Mr. Macharia appeared for the interested parties. Mr. Wacharia stated before court that he had instructions to pay the sum Shs. 1,170,000/-to the (deceased) Plaintiff herein through his advocate, Mr. Wachira. In turn, Mr. Wachira stated that he was instructed to accept the cheque pending the settlement of the contested balance. Thereafter the matter came before Khaminwa J. for mention on 10th May 2010. This time, the parties were represented as before but Mr. Mbugua held brief for Mr. Macharia and stated to the court that he had a cheque for Shs. 200,000/-to hand to Mr. Wachira. As I understand it from the affidavit evidence, the Shs. 200,000/- was tendered as to Shs. 170,000/-towards the advocates' costs for the criminal case in Kibera and Shs. 30,000/-to be paid to the Plaintiff to make up the aforesaid amount of Shs. 1,170,000/-to Shs. 1,200,000/-. As I see it therefore, the Plaintiff had been fully reimbursed for the sum he had paid towards the purchase of the property in the Kitengela as well as for the costs of the criminal proceedings at Kibera.

9. Looking at the Plaint dated seventh of May 2010 and the Amended Plaint dated twelfth of October 2010 the first prayer (a) in both, is asking for the principal amount of Kenya Shs. 1,200,000/-. That has been paid. What remains is the claimant for interest on the said sum of Shs. 1,200,000/-from 9 December 1996 (presumably) to date. Notably, the Amended Plaint details that such interest should be at the Court rate, whereas I understood counsel for the Plaintiff as saying that she was seeking interest at the rate in the Agreement as between her husband (now deceased) and the said Baneland Enterprises Limited of 30% per annum. In any event, I agree with counsel for the Defendant and find that that the said Agreement was never executed nor dated and as such never came into existence. I suppose that this is the reason why the Amended Plaint detailed the Court rate of interest in prayer (b). Apart from the question of interest, the Amended Plaint sought General Damages for loss of bargain on the subject land, as well as to fraud, loss of user and business opportunity. It also sought interest on those prayers plus costs of the suit and any other relief that the court may deem just and fair. These then are the matters that are still for determination before court.

10. As noted above, it was the Plaintiff\'s contention that the issue of the *res judicata* did not apply in this matter as the same had been filed while the criminal proceedings were still pending. That may be so in that from the record of the proceedings in the Senior Principal Magistrate\'s court at Kibera, the case was only withdrawn by the State on 8 October, 2010. Similarly, in Miscellaneous Criminal Application No. 24 of 2010 the last mention of the matter before Khaminwa J was on 18 May, 2010 wherein it was recorded:

**"By consent the criminal case at Kibera No. 1072/2009 is now settled. The parties to draw the consent order for approval by the court. That is all."**

It seems then that the proceedings at Kibera took a little time to be recorded as settled. The Plaint herein was filed on 7 May, 2010. By that date, as per the copy of the proceedings in Miscellaneous *Criminal Application No. 24 of 2010*, the Plaintiff had already received a cheque for Shs. 1,170,000/-towards the claimed amount in the Plaint of Shs. 1.2 million. That was on the 26 April, 2010 and on that date, the mention date of 10May 2010 was fixed by consent. As detailed above it was on 10 May, 2010 that the other cheque for Shs. 200,000 /-was tendered and accepted by Mr. Wachira on behalf of the Plaintiff. In other words, the Plaintiff\'s monetary claim against the Defendant was 97% paid prior to the time the suit was filed.

11.The issue for a determination as put before the court was whether this matter could be struck out for the reason that it was *res judicata*, bearing in mind the facts as above. The Defendant relied upon the case

of **Hunter v Chief Constable of West Midlands & Anor.** (supra) as per **Lord Diplock** wherein he referred to the judgement of A. L. Smith in the case of **Stephen v Garnett** in which the learned judge detailed as follows:

**"…. The court ought to be slow to strike out a statement of claim or defence and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has already been decided by a competent court."**

Similarly, in the case of **Reichel v Magrath 14 App Cas 665 at page 668, Lord Halsbury** stated *inter alia*:

**"…. I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were permitted by changing the form of the proceedings to set up the same case again."**

**Lord Diplock** in rendering his decision in the **Hunter** case stated that the issue in the civil suit had been conclusively dealt with in the criminal suit and that any "new evidence" that the plaintiff claimed he had, had already been dispensed with in the previous suit. The learned Judge reiterated as follows:

**"…. I find myself in full agreement with the judgement of Goff LJ. He points out that on this aspect of the case Hunter and the other Birmingham bombers failed** *in limine* **because the so-called 'fresh evidence' on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then."**

One of the cases referred to in the **Hunter** authority was the case of **Director of Public Prosecutions v Humphrys (1976) 2 All ER 497** in whichthe court referred to the decision of **Lord Diplock** in **Mills vs Cooper (1967) 2 All ER 100 at P. 103** who hadthis to say:

**"…. a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or the legal consequence of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."**

12.In **Mills vs Cooper**, the issue for determination by the court was whether the matter in a case had been concluded in a previous suit brought on similar facts. It was held that the issue had been heard and determined in a previous suit, the prosecution was barred from re-opening the question and hearing the case a new. **Lord Diplock**, in rendering his decision, referred to the case of **Haystead vs Taxation Commissioner (1925) All ER 56** wherein he observed:

**"…. the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation."**

In another case brought to the attention of the court in the **Hunter** matter, being that of **Mcllkenny vs Chief Constable (1980) 2 All ER 229, Lord Loreburn** struck out the action by saying:

**"the issue had already been finally determined against them by a court of competent jurisdiction in the criminal proceedings to which they were parties, and in those proceedings they had a full and fair opportunity of presenting their case, and in all the circumstances it would not be just to allow them to re-open the issue… In any event it would be an abuse of process to all the Plaintiffs to litigate again the identical issue to that which had already been decided against them in the criminal proceedings, and they would not be permitted to call the further evidence on which they**

**sought to rely…".**

Bearing the above in mind, it seems that the litigation can only be reopened if the Plaintiff can show that the judgement was obtained by fraud or collusion or that there is new evidence that could not have been, by reasonable diligence, adduced at the hearing of the previous suit. It would not only be an abuse of the process but also unfair and unjust and against the principle that litigation has to come to an end.

13.It was Mr. Kamotho who referred this court to the decision of the Court of Appeal in the **Pop-in** case (supra) as regards the principle of *res judicata*. In that case the Court held *inter-alia*:

**"…. The plea of** ***res judicata*****applies not only to points which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."**

Further with regard to the matter being *res judicata,* **section 7** of the *Civil Procedure Act* provides that:

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

Explanation (4) of that section further provides that:

**"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

14.From the above, it is clear that the court will not deliberate on a matter that has been directly and substantially in issue in a previous suit. Further, a matter that the party to the suit ought to have, by reasonable diligence, raised in the former suit, will be deemed as determined by the court in that suit. In the matter before me, the Plaintiff\'s claim is not for the principal amount of Shs. 1,200,000/-but for interest, damages and costs of the suit. There is no doubt that both the Miscellaneous Criminal Application as well as the Criminal Case in Kibera were "settled" by the Plaintiff accepting the principal amount of Shs. 1,200,000/- plus a further Shs. 170,000/= being advocates' costs. Is it right that the Plaintiff, after the two suits as above were compromised by settlement, can now bring a subsequent suit for damages in fraud and breach of contract? Could it be said that that the matters raised in both the Plaint and the Amended Plaint herein had already been substantially and directly dealt with in the two criminal cases? Some assistance may be gleaned in solving this knotty problem from the holding of **Lord Diplock** in the case of **Thoday vs Thoday (1964) 1 All ER 341 at page 352** where the learned judge stated:

**"…. The determination by a court of competent jurisdiction of the existence or non-existence of fact, the existence of which is not itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before the court, but which is only relevant to proving the fulfilment of such a condition, does not at any rate***per rem judicatam***exonerate either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court."**

15.The issues of general damages for loss of bargain and fraud, interest and costs were not raised in the two criminal cases aforesaid. Neither this court nor the court in Kibera deliberated upon these issues and there was no reason why they should have done bearing in mind the criminal aspect of those proceedings. I find that the subject matter of this suit has not been compromised by the two matters in the criminal courts. However, I am disturbed that the Plaintiff has not come to this court with such clean hands. By this I mean that he had already been paid (as above) 97% of the Shs.1,200,000/-which he is now claiming in the first prayer in the Plaint. It is for this reason that in dismissing the Defendant\'s Notice of Motion dated 2 April 2012, I make no orders as to costs.

**DATED and delivered at Nairobi this 20th day of September, 2012.**

**J. B. HAVELOCK**
**JUDGE**